84-449

No.

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In the Supreme Court of the United States

October Term, 1984

ROGER SWIFT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOEL S. PERWIN, ESQ.
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorney for Petitioner

September 19, 1984

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT CONVICTION FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT UNDER THE HOBBS ACT, 18 U.S.C. §1951(b)(2), DOES NOT REQUIRE ANY PROOF THAT THE DEFENDANT PUBLIC OFFICIAL INDUCED OR SOLICITED THE PAYMENT.

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ROGER SWIFT,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Roger Swift, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 21, 1984, and rendered by denial of rehearing on June 22, 1984.

OPINION BELOW

The decision of the Court of Appeals is reported at 732 F.2d 878, and appears in the appendix hereto at page A1. The judgment of the District Court appears at A9, its order denying post-trial motions at A8; neither are reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1984 (A10). A timely petition for rehearing was denied on June 22, 1984 (A11). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

This petition for certiorari was not filed within 60 days of the appellate court's June 22 order denying rehearing (or by August 21, 1984), as provided by Rules 20.1 and 20.4 of the Rules of the Supreme Court. The reason is that after the appellate court denied his petition for rehearing, the petitioner (hereinafter "Swift") initially determined not to file a petition for writ of certiorari in this Court. The primary basis upon which Swift had sought review in the circuit court, as we explain more fully below, was that the trial court had erred in effectively instructing the jury that conviction for extortion by a public official under 18 U.S.C. §1951 requires no more than proof of ordinary bribery—of the mere passive receipt of money by such a public official, in the absence of any affirmative solicitation. At the time the appeal was brought, the petitioner's success on this point required that he convince the circuit court to reject the reasoning of a number of recent Abscam-era cases which appear to abolish any distinction between bribery and extortion—holding that the mere passive receipt of money by a public official is sufficient inducement to constitute extortion—and instead to adopt the holdings of a number of earlier cases that conviction for extortion requires some proof of affirmative exhortation or inducement by the defendant.

In reliance upon the more-recent line of cases, the circuit court rejected that argument and affirmed the conviction. Since at that time there was no recent de-

cision of any circuit court to the contrary, and mindful of this Court's onerous calendar, Swift concluded that the chances of succeeding upon certiorari were remote, and determined not to seek such a writ.

All of that changed with the *en banc* decision of the United States Court of Appeals for the Second Circuit in *United States v. O'Grady*, No. 83-1344 (2nd Cir., July 12, 1984) (*en banc*) (53 U.S.L.W. 2090)—holding that conviction for extortion under color of official right does require proof that the public official affirmatively induced payment of the benefits received. The *O'Grady* decision created an explicit inter-circuit conflict on the precise point at issue in this case, thus creating the opportunity for the petitioner in this case to seek review by this Court in the good-faith belief that review might now be accepted.

The *O'Grady* case was decided July 12, 1984, and a summary of *O'Grady* appeared for the first time in the United States Law Week issue dated August 21, 1984. That issue was received in the undersigned counsel's office on August 23 or 24, and was circulated to the undersigned counsel on August 24. The undersigned counsel read about the *O'Grady* opinion on the evening of August 24, and immediately began to prepare a motion seeking an extension of time in this Court to file a petition.

Rules 20.1 and 20.6 of the Rules of the Supreme Court do provide for extensions of up to 30 days in which to file such a petition; but Rule 29.2 says that such a request for extension should be submitted at least 10 days before the specified filing date. Swift's petition was due to be served by August 21, and therefore any such motion for extension was due to be served by August 11. However, Rule 29.2 does provide that a later-filed extension will be considered

"in the most extraordinary circumstances . . . ." Thus the undersigned counsel prepared such a motion over the weekend of August 25, and forwarded it to this Court by express mail on the next business day, August 27.

The motion was received by the Clerk of this Court on August 28, and was returned to the undersigned counsel with a letter dated August 29 (A14), explaining that the Court will consider a late motion for extension only if such a motion is filed within the original 60 days allowed by the rules. However, the letter also noted that the filing of a petition for writ of certiorari out of time in a criminal case is not a jurisdictional defect, and that the petition would be docketed even if filed late. The undersigned counsel then commenced work on the petition, and is serving this petition within 30 days of the original due-date of August 21—that is, within the 30-day period of extension permitted by the rules in extraordinary cases.

It is respectfully submitted that this is such an extraordinary case. The initial decision not to seek review in this Court was the right one, in the absence of any inter-circuit conflict on the point in question. The intervening *O'Grady* decision changed that calculus, creating an explicit inter-circuit conflict, and making review of the opinion of the circuit court in this case appropriate. It is respectfully submitted that such review will not burden the calendar of this Court. If review of the *O'Grady* decision is denied by this Court, then of course it seems likely that review in this case will be denied also. On the other hand, if this Court agrees to review the *O'Grady* decision, then review of the instant case will not create any significant additional judicial labor. We are asking only for the opportunity to stand or fall with this Court's decision to review *O'Grady*. Since we are filing this petition within the permissible 30-day extension permitted by the rules, and since we have

engaged in no dilatory conduct or neglect, we respectfully submit that this is one of a very few extraordinary circumstances in which such a late petition should be received.

FEDERAL STATUTE

18 U.S.C. §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

With only a few exceptions, the relevant facts of this case are fairly presented in the Circuit Court's opinion; where appropriate we will reference additional evidence

in the Record on Appeal.[1] Swift was indicted for extortion under 18 U.S.C. §1951 (A12). The indictment expressly charged that in his capacity as Sewer Director of the City of Key West, Florida, Swift was guilty of extortion "in that" he "solicited and demanded a sum of money" from an agent (Bobby Joe McBee) of a construction company (CFW), and that CFW's "consent" to make payment was "induced both by fear of economic loss and under color of official right," in return for which Swift promised to expedite payments to CFW for vouchers for completed work, and to eliminate construction delays (A12-A13). In other words, by its indictment, the government obligated itself to prove not simply that Swift was the passive recipient of a bribe, but that he had affirmatively acted to solicit and demand the money in return for promised favors.

As the Circuit Court's opinion notes (A4), Swift's defense, in reliance upon the government's burden to prove what it had alleged in the indictment, was that he had taken the money only because exhorted by McBee to do so. He offered repeated evidence that the company was having trouble with the federal government, and that some of its highest officials had entered into plea agreements under which they had promised to cooperate fully with any governmental investigation of the utility construction industry (*see* Tr. 75, 80-83, 87, 170-72, 177).

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1. "R." refers to the Record on Appeal. "Tr." refers to the separately-paginated transcript of the jury trial held in this case on August 1 and 2, 1983. The two volumes of the transcript are designated Documents No. 71 and 72 in the Index to the Record on Appeal.

The petitioner has not requested that the clerk of the circuit court certify and transmit the record to this Court under Rule 19 of the Rules of the Supreme Court. Both sides of this case have agreed on the relevant facts throughout, and no such certification is necessary. Should any controversy arise, we will request certification of the record under Rule 19.

Swift's suggestion to the jury was that McBee and CFW had set him up to curry favor with the government, and he testified that it was McBee who had initiated talk about the pay-off—as consistent with CFW's common practice on construction jobs—and who had consistently exhorted Swift to take the money (Tr. 414-18, 430). Swift attributed to McBee the representation that McBee would be leaving CFW in the near future, and that CFW would not give him a good recommendation unless he accomplished this standard task (Tr. 416). The circuit court's opinion neglects to acknowledge that this defense was expressly corroborated by one of the tape-recorded conversations (*see* A3), in which McBee said expressly that Swift's acceptance of the money would "mean a difference of me getting a job somewhere else" (Tr. 510). Thus, Swift's story was not only inconsistent with the government's indictment, but was corroborated by the tape recording. On the other hand, as the circuit court's opinion makes clear (A3), there was also evidence to contradict Swift's story.

As the opinion notes (A4), the trial court's initial instruction to the jury was entirely consistent with the indictment and with Swift's understanding of the government's burden. The opinion neglects to note that the initial charge was proposed by the government (R. 98). The judge charged the jury to find extortion only if it concluded that Swift had "induced" McBee to part with the money by obtaining it under color of official right (Tr. 575-76). The court noted that "the wrongful use of otherwise valid official power may convert dutiful action into extortion," and continued: "So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question"

(Tr. 576). Thus, the trial court plainly charged the jury, consistent with the government's indictment, that Swift's conviction might be predicated only upon some affirmative exhortative conduct—as opposed to merely passive receipt of the money.

As the opinion notes (A4), the jury sent back three questions after its first hour of deliberation. They are quoted at A4. The trial court's responses, with the express approval of both Swift and the government, were that it *was* necessary for Swift to make the first approach to be guilty of extortion; and that Swift might be guilty even if McBee had offered the money first, but only so long as that money was *demanded* by Swift before it was offered by McBee. But the court declined to tell the jury the difference between bribery and extortion, referring it back to the initial instructions (A4).

That afternoon the jury sent back two more questions, only one of which is relevant to this appeal. It asked if the jury decided that McBee had offered some money for help in resolving CFW's problems, and that Swift had stated a dollar amount, if that was extortion (A4). There followed an extended colloquy between the court and counsel, in which the government disclaimed its obligation to prove the charge in the indictment, abandoned the earlier jury charges which the government had first proposed, discovered the Abscam-era cases for the first time, and urged the court to charge that Swift was guilty of extortion for taking the money alone (Tr. 601-15). As the circuit court's opinion notes (A5), the trial court was persuaded to answer "yes" to the jury's afternoon question—that is, that it was still extortion if McBee offered some money and Swift stated the amount; and further, that the answer to the first of the morning questions should have been "no" rather than "yes"—that is, that it was not necessary

for Swift to make the first approach in order to be guilty of extortion. Within 10 or 15 minutes, the jury returned with its conviction (Tr. 627-28).

Without question, the jury had believed Swift's version of what had happened—that McBee had made the first approach; that McBee had offered the money; that McBee had exhorted Swift to take it; and that Swift did no more than name an amount under this urging, and then take it. The trial court's answers informed the jury that Swift would be guilty of extortion simply because he named the amount, even if Swift was telling the truth that he named the amount only because McBee had hounded him to do so.

The circuit court found nothing wrong with that conclusion. In reliance upon the decision in *United States v. Hedman,* 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981)—holding that it is unnecessary to show that the defendant "induced" the payment, but only that he "obtained money to which he is not entitled"—the circuit court held that Swift was guilty of extortion because the evidence showed that he was "acting under color of official right when he accepted the payments from McBee" (A6). The circuit court continued: "Thus, the district court's instructions/answers to questions to the effect that the government need not prove that [Swift] initiated the conduct or coerced the payment of the money were correct" (*id.*).

REASONS FOR GRANTING THE WRIT

We acknowledge that the circuit court's decision was consistent with the weight of authority which existed at the time it was made. Indeed, that is why Swift did not

initially seek review by this Court. Although there are some earlier cases which hold that the mere passive receipt of a bribe is not extortion—that the defendant must have taken some affirmative action to induce the payment[2]—the later Abscam-era cases effectively abolished the distinction between bribery and extortion, holding that the passive receipt of money by a public official is enough.[3] It was not until the *O'Grady* decision that a direct and present inter-circuit conflict was created.

In *O'Grady*, the government proved only that a New York City transit official had accepted assorted benefits from some companies under contract to provide subway cars to the city, and the district court instructed that the government was not required to show that the defendant "in words or otherwise" induced or solicited those benefits. In an *en banc* decision, the Second Circuit reversed, holding that conviction for extortion requires proof

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2. *See, e.g., United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir.), *cert. denied*, 439 U.S. 1116 (1978); *United States v. Trotta*, 525 F.2d 1096, 1101 (2nd Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Mazzei*, 521 F.2d 639, 645 (3rd Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Crowley*, 504 F.2d 992, 995 n.5 (7th Cir. 1974); *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir.), *cert. denied*, 404 U.S. 1058 (1971); *United States v. Sutter*, 160 F.2d 754, 756 (7th Cir. 1947); *United States v. Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979), *aff'd*, 629 F.2d 1174 (6th Cir. 1980); *United States v. Kubacki*, 237 F. Supp. 638, 641 (E.D. Pa. 1965).

3. *See, e.g. United States v. Jannotti*, 673 F.2d 578 (3rd Cir.), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Butler*, 618 F.2d 411, 417 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980). For an exhaustive summary of all of the cases on this issue, see the Second Circuit's discussion in *United States v. O'Grady, supra*. *See generally United States v. Jannotti*, 673 F.2d 578, 627 (3rd Cir.) (Aldisert, J., dissenting), *cert. denied*, 457 U.S. 1106 (1982); *United States v. Cerilli*, 603 F.2d 415, 426-37 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); Ruff, *Federal Prosecution of Local Corruption; a Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977).

of some affirmative conduct under color of office which causes the provision of benefits. That kind of inducement can take many forms—like requests, demands, solicitations, some *quid pro quo*, or other circumstantial evidence showing that the official had induced the payments. Even an inchoate impression that the official expected payment might be enough—but the passive receipt of money would not. That would be bribery, punishable under another statute (18 U.S.C. §201(c)).

It would serve no useful purpose to borrow selectively from the Second Circuit's masterful treatment of the legislative history of the Hobbs Act, and of the cases enforcing it. On the legislative history, the *O'Grady* opinion, and the authorities which it cites, establish that the common-law definition of extortion did not encompass the merely-passive receipt of money by a public official; that the federal statute was predicated primarily upon a New York statute which drew an explicit distinction between bribery and extortion; and that the legislative history of the Hobbs Act leaves little question that Congress intended to preserve that distinction. Any other construction of the statute would render it identical to the bribery statute, 18 U.S.C. §201(c), at least regarding public officials —in that bribery of a public official would always constitute extortion by a public official, and extortion by a public official would always constitute bribery of a public official. At the least, the courts should indulge "a presumption against construing a statute in such a way as to render it superfluous."[4]

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4. *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). *See United States v. Frade*, 709 F.2d 1387, 1401 (11th Cir. 1983); *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977); *Continental Illinois National Bank and Trust Co. of Chicago v. United States*, 403 F.2d 721, 724 (Ct. Cl. 1968), *cert. denied*, 394 U.S. 973 (1969).

There can be no question that if Roger Swift had been convicted in the Second Circuit instead of the Eleventh Circuit, he would now be preparing for a new trial. Admittedly, there was sufficient evidence in this case to permit the conclusion that it was Swift who had demanded the money under color of his office. But there was also sufficient evidence to permit a conclusion that even though he eventually succumbed to McBee's pressure and named an amount of money, he did so only after repeated exhortation—in short, that his naming of a dollar amount was not a form of inducement, but a surrender to unrelenting pressure. And yet, the trial court's answers to the jury's inquiry permitted Swift's conviction even under such circumstances. The circuit court acknowledged as much, in its observation that Swift was properly convicted because he was "acting under color of official right when he *accepted* the payments from McBee" (A6) (our emphasis).

We respectfully submit that it is fundamentally unfair for Swift's status as guilty or innocent—and thus his freedom—to depend so directly upon the judicial circuit in which he was tried. The conflict between the circuits on this question is direct and irreconcilable. It should be resolved by this Court, in *O'Grady* and in this case.[5]

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5. If permitted to brief this case on the merits, we would make two additional points in support of reversal: 1) because of the language of the government's indictment in this case (A12-A13), the government obligated itself to prove exhortation or inducement even if no such proof is required under the extortion statute. Thus, the trial court's belated instructions to the jury constituted either a constructive amendment to, or a fatal variance from, the indictment, which is a violation of the defendant's due-process rights; and 2) that even if the Abscam-era cases are correct, the trial court's charge in this case was erroneous in light of the trial court's correct decision to instruct the jury on entrapment—because the late instructions erroneously imposed upon Swift the burden to prove his entrapment defense. The circuit court was wrong to reject both points.

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

By: JOEL S. PERWIN

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roger SWIFT, Defendant-Appellant.

No. 83-5690

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

May 21, 1984.

Defendant was convicted in the United States District Court for the Southern District of Florida, Norman C. Roettger, Jr. J., of Hobbs Act violation, and he appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that evidence that defendant, a city sewer director, was acting under color of official right when he accepted payments from contractor in return for facilitating approval of periodic progress payments to contractor for construction of several sewage pumping stations was sufficient to sustain Hobbs Act extortion conviction, regardless whether defendant initiated conduct or coerced the payment.

Affirmed.

1. Extortion and Threats (Key) 16

Evidence that city sewer director was acting under color of official right when he accepted payments from construction company in return for facilitating approval of periodic progress payments to company for construction of several sewage pumping stations was sufficient to sustain

conviction of extortion under the Hobbs Act, regardless whether director initiated conduct or coerced payment of the money. 18 U.S.C.A. §§ 1951, 1951(a).

2. Criminal Law (Key) 847

District court was not estopped from correcting erroneous instruction simply by failure of prosecutor to realize problem and timely object.

Joel S. Perwin, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Miami, Fla., for defendant-appellant.

Martha Rogers, Linda Hertz, Andrea Simonton, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

[1] Roger Swift appeals to this court from his conviction in the district court for violation of the Hobbs Act, 18 U.S.C. § 1951. Swift contends that the district court's answers to questions posed by the jury during their deliberations were prejudicially confusing and incorrect as a matter of law. Finding no error, we affirm.

The Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by bribery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in fur-

> therance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

18 U.S.C. § 1951(a). At trial, the government sought to prove that Swift used his position as sewer director of Key West, Florida to obtain money from the CFW Construction Company in return for facilitating approval of periodic progress payments to it for the construction of several sewage pumping stations.

The evidence produced at trial showed that Swift, in January, 1983, accepted $25,000 from Bobby Joe McBee, an employee of CFW. (McBee was "wired" by the FBI at the time he made the payment.) At trial, Swift did not contend that he never accepted the money, but based his defense on the claim of entrapment. Swift testified that McBee first approached him, at the direction of the FBI, offering money and that CFW had "set him up" to curry favor with the government. The government, however, produced evidence that Swift first approached McBee and CFW requesting money and persistently contacted them, insisting on receiving payment. The government also produced evidence showing that Swift, who had authority to approve CFW's payment requests, emphasized to CFW his ability to deny those requests and told them that he could alleviate any problems they might experience with job inspections conducted by the project engineer hired by the city. Swift wrote out a "schedule of payments" that he expected to receive from CFW. Swift testified, however, that McBee insisted that Swift accept the payments, giving as his reason that if he left his job at CFW without paying Swift he would not receive a good recommendation for another job. Swift nevertheless admitted that he, and not McBee, first specified the amount of money that Swift expected to receive.

On appeal, Swift does not contend that the trial court's charge to the jury was incorrect in any way. The claimed error is based on the answers given by the trial judge to three questions asked by the jury during their deliberations. The first two questions were asked by the jury simultaneously at about 10:45 a.m. on the first full day of deliberations. The questions, with the answers initially given by the trial judge, are as follows:

Question I:

> Is it necessary for Swift to approach McBee first to be an act of extortion?

Answer: Yes.

Question II:

> If CFW (McBee) offers the money first, is this still extortion (if Swift accepts the money)?

Answer: Yes, provided the money was demanded by Swift before it was offered by CFW.

In reply to a third question that inquired as to the difference between accepting a bribe and extortion, the court responded: "Please confine yourselves to the offense charged, *i.e.* extortion with the definition given you." The court then recessed until 2:10 p.m. at which time the jury asked another question.[1] The jury asked:

Question:

> If CFW or McBee offer "some money" for help in resolving problems and Swift stated a dollar amount, $25,000, and then the money is paid—is this extortion?

---

1. The jury actually asked two questions; however, one of the questions is not relevant to the issues on appeal.

The trial judge gave the following answer:

> Upon further reflection and research the answer to the first three questions you submitted this morning should have been a "no" answer rather than "yes."
>
> The answer to this jury question, as stated above, is "yes."
>
> The issues remain for you to decide whether the government has proved beyond a reasonable doubt both of the following:
>
> (1) whether Roger Swift committed extortion as defined in the instructions of law; and, if so,
>
> (2) whether Roger Swift had the predisposition to commit the offense as defined in these instructions.
>
> In arriving at your verdict you are reminded to consider all the evidence and all of the court's instructions.

Swift's attorney objected to the third answer on two grounds. First, he argued that Swift could not be found guilty of extortion unless Swift initiated the demand for payment. Second, he argued that the entrapment issue was woven into the determination of extortion and that entrapment should be considered before the jury determined the other elements of extortion. The defense counsel argued that the answer to the question should be "maybe" rather than "yes." On appeal, Swift relies on essentially the same arguments, adding a claim that the government, by agreeing to the trial judge's decision to answer the first question yes, was estopped later to change its position.

An examination of the cases demonstrates that Swift's attempted distinction of bribery and extortion (on the basis

of inducement of the payment by the defendant) is without merit. In *United States v. Hedman,* 630 F.2d 1184 (7th Cir.1980), *cert. denied,* 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981), the court stated:

> It is settled law in this Circuit as well as others that in a Hobbs Act prosecution for extortion under color of official right it is unnecessary to show that the defendant induced the extortion payment or that the payor was entitled to the benefit obtained from such payment. The government is merely required to prove that a public official obtained money to which he is not entitled and which he obtained only because of his official position.

630 F.2d at 1195 (footnote omitted) (citing cases from seven circuits). The case law in the Fifth and Eleventh Circuits is in accord. In *United States v. Williams,* 621 F.2d 123 (5th Cir.1980), *cert. denied,* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981), the court expressly rejected the contention that "coercion is an essential element of the crime . . . ." *Id.* at 124; *see also United States v. Glass,* 709 F.2d 669, 674 (11th Cir.1983). It is clear in this case that the evidence showed that Swift was acting under color of official right when he accepted the payments from McBee. Thus, the district court's instructions/answers to questions to the effect that the government need not prove that Smith initiated the conduct or coerced the payment of the money were correct.

[2] Given that Swift's arguments concerning the meaning of extortion are without merit, it is clear that his other claims are also groundless. The district court is not "estopped" from correcting an erroneous instruction simply by the failure of the prosecutor to realize the problem and timely object. *See United States v. Valencia,* 645 F.2d

1158 (2d Cir.1981) (trial court has power to correct erroneous instruction). Moreover, any possible confusion that may have resulted from the erroneous answer to the jury's first question operated to the defendant's benefit by requiring the government to prove not only inducement under color of official right, but a specific demand by the defendant. Such an error, which operates to the benefit of the defendant, does not serve as the basis for reversal. *See United States v. Thomas*, 567 F.2d 638 (5th Cir.), *cert. denied*, 439 U.S. 822, 99 S.Ct. 90, 58 L.Ed.2d 114 (1978). Swift raises several other contentions concerning the propriety of the court's answers to the jury's questions; however, we have carefully reviewed his arguments and brief, and we do not find any reversible error by the district court.

The judgment is

AFFIRMED.

(Filed September 26, 1983)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-100-Cr-NCR

UNITED STATES OF AMERICA

v.

ROGER SWIFT

ORDER

THIS CAUSE is before the court on motion of defendant for a new trial. Upon consideration of the record in this case, it is

ORDERED that defendant's motion is denied.

DONE AND ORDERED this 26 day of Sept., 1983.

/s/ Norman C. Roettger, Jr.
United States District Judge
Norman C. Roettger, Jr.

cc AUSA (Rogers)
Josefsberg

United States of America vs.

DEFENDANT: ROGER L. SWIFT

United States District Court for SOUTHERN DISTRICT OF FLORIDA

DOCKET NO: 83-100-CR-NCR

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: Sept. DAY: 6, YEAR: 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Robert C. Josefsberg, Esq.
(Name of Counsel)

FILED BY ____ D.C.

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [X] NOT GUILTY

SEP -9 PM 5 47

ROBERT M. MARCH
CLERK US DIST. CT.
SD OF FLA.-FTL.

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Attempting to obstruct, delay and affect commerce by means of extortion, in violation of 18 USC 1951.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS or until otherwise discharged by due process of law. It is furthe ORDERED that execution of sentence is deferred until October 18, 1983 at 10 A.M. at which time the defendant shall report to the institution designated by the Bureau of Prisons at his own expense, or in the alternative, he must report to the U.S. Marshal in Miami by 10 A.M. on October 18, 1983.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON SEP - 9 1983
THIS DATE
BY Deborah Chin
( )CLERK
( )DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

NORMAN C. ROETTGER, JR. Date Sept. 6 1983

17

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5690
Non-Argument Calendar

D.C. Docket No. 83-00100-CR-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROGER SWIFT,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: May 21, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ Illegible
Deputy Clerk

ISSUED AS MANDATE: JUL 23 1984

(Filed June 22, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5690

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROGER SWIFT,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 83-100

18 U.S.C. §1951

M/S 20 years - $10,000

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROGER LEO SWIFT,
Defendant.

INDICTMENT

The Grand Jury charges that:

On or about and between May 29, 1982, and January 13, 1983, at Key West, Monroe County, in the Southern District of Florida, the defendant, ROGER LEO SWIFT, did knowingly, willfully, and unlawfully attempt to obstruct, delay, and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, by extortion, as extortion is defined in said section of the United States Code, in that the defendant, ROGER LEO SWIFT, a public official, to wit, Sewer Director, City of Key West, solicited and demanded a sum of money, to wit, forty-five thousand dollars ($45,000), and obtained a sum of money, to wit, twenty-five thousand dollars ($25,000) from Bobby Joe McBee, an agent and representative of CFW Construction Company, Inc., a Tennessee corporation which had a contract with the City of Key West, with the consent of CFW Construction Company, Inc., said consent having been induced both by fear of economic loss and under

color of official right, which said sum was paid to the defendant, ROGER LEO SWIFT, in return for an agreement to expedite payment of CFW Construction Company, Inc.'s vouchers for completed work and to eliminate project construction delays.

All in violation of Section 1951, Title 18, United States Code.

A TRUE BILL

/s/ (Illegible)
Foreperson

/s/ Stanley Marcus
Stanley Marcus
United States Attorney

/s/ Martha P. Rogers
Martha P. Rogers
Assistant United States Attorney

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 29, 1984

Joel S. Perwin, Esq.
Podhurst, Orseck, Parks, et al.
Suite 1201, City National Bank
Building
25 West Flagler Street
Miami, Florida 33130-1780

RE: Roger Swift v. United States

Dear Mr. Perwin:

Your application for an extension of time within which to file a petition for a writ of certiorari was received on August 28, 1984 and is herewith returned as out of time.

An application for an extension of time within which to file a petition for a writ of certiorari in a criminal case must be presented to the Clerk within 60 days of the judgment sought to be reviewed. See Rules 20.1 and 29.2. Therefore, your application for an extension of time was due on or before August 21, 1984.

However, filing a petition for a writ of certiorari out of time in a criminal case is not a jurisdictional defect. You can still file your petition, and it will be docketed and sent to the Court with a notation as to its untimeliness.

Please note that pursuant to Rule 28.4 of the Rules of the Supreme Court, service must be made upon the

Solicitor General of the United States when the United States is a party to an action.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By /s/ Edward L. Turner, Jr.
Edward L. Turner, Jr.
Assistant Clerk

Enc.

Office - Supreme Court, U.S.
FILED
DEC 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-449

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER SWIFT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court correctly instructed the jury that a public official who demands payment from a private person in exchange for services may be guilty of extortion under color of official right, in violation of the Hobbs Act, even if the possibility of payment was first raised by the private person.

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Statute and rule:

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-449

ROGER SWIFT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 732 F.2d 878.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on May 21, 1984, and a petition for rehearing was denied on June 22, 1984 (Pet. App. A11). The petition for a writ of certiorari was filed on September 19, 1984, and is therefore out of time under Rule 20.1 of the Rules of this Court (see Pet. App. A14-A15).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951, and sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A7).

1. a. The evidence at trial, the sufficiency of which is not in dispute (Pet. 12), showed that petitioner used his position as sewer director of Key West, Florida to obtain money from CFW Construction Company, which was building several sewage pumping stations for the city, in exchange for securing approval of CFW's requests for progress payments on its contracts and other benefits (Pet. App. A3). A city engineer asked Bobby Joe McBee, CFW's project manager, to meet with petitioner on May 29, 1982. At the meeting, petitioner told McBee that certain people in Key West needed to be "taken care of" to ensure that the job proceeded smoothly. McBee communicated petitioner's demand to CFW's vice-president. Although CFW refused to pay, petitioner persisted in asking McBee for money once or twice each week. Tr. 114-120.

Petitioner's insistence intensified during December 1982. McBee said that CFW would respond after Christmas. On January 10, 1983, McBee reported petitioner's demands to the Federal Bureau of Investigation. The following day, the FBI wired McBee with a tape recorder before a meeting with petitioner. Petitioner was recorded at the meeting explaining what he could do for CFW in connection with job inspections and progress payments. He also wrote a schedule of payments that he expected McBee to make. Petitioner demanded an immediate payment of $25,000 and a later payment of $20,000. Tr. 123-129, 138-150.

The payoff occurred on January 13, 1983, during a second recorded meeting. McBee tried to convince petitioner to accept only $5,000, but petitioner insisted on the full $25,000. Petitioner reiterated the quid pro quo: he would obtain the votes of the city councilmen whenever CFW needed them; he would process CFW's payment requests as soon as they were received; he would eliminate any problems with the city engineer; and he would resolve

any other problems that CFW was having with the project. McBee then gave petitioner the $25,000. Tr. 151-159.

Petitioner acknowledged what had occurred during his recorded conversations with McBee and admitted that he, not McBee, had first specified the amount of the payments. He claimed, however, that McBee had contacted him first in August or September 1982 and had entrapped him into accepting the money. Tr. 413-417, 422, 496, 553-554.

b. The district court charged the jury that the government was required to prove that petitioner "induced Bobby Joe McBee to part with $25,000" and that he "did so knowingly and willfully by means of 'extortion' " (Tr. 575). After the jury had retired and begun its deliberations, the foreman submitted two questions to the court. The questions, together with the answers initially given by the court, were as follows (Pet. App. A4; Tr. 597-598):[1]

Question 1:	Is it necessary for [petitioner] to approach McBee first to be an act of extortion?
Answer:	Yes.
Question 2:	If CFW (McBee) offers the money first, is it still extortion (if [petitioner] accepts the money)?
Answer:	Yes, if you find beyond a reasonable doubt that it was in response to a demand by [petitioner].

Approximately three hours later, the jury submitted another question to the court (Pet. App. A4-A5; Tr. 601):

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[1] A third question submitted the same morning inquired of the difference between accepting a bribe and extortion. The court responded, " 'Please confine yourselves to the offense charged, *i.e.* extortion with the definition given you.' " Pet. App. A4.

Question: If CFW or McBee offer "some money" for help in resolving problems and [petitioner] stated a dollar amount, $25,000, and then the money is paid — is this extortion?

Following discussion with counsel, the court replied (Pet. App. A5; Tr. 611; 614):

Answer: Upon further reflection and research the answer to the first of three questions you submitted this morning should have been a "no" answer rather than "yes."

The answer to this jury question, as stated above, is "yes."

The issues remain for you to decide whether the Government has proved beyond a reasonable doubt both of the following:

One, whether [petitioner] committed extortion as defined in the instructions of law; and if so,

Two, whether [petitioner] had the predisposition to commit the offense as defined in these instructions.

* * * * *

In arriving at your verdict you are reminded to consider all of the evidence and all of the court's instructions.

Petitioner objected to the court's new answer to the first question and its response to the last question on the ground that he could not be found guilty unless he initiated the demand for payment (Tr. 601-610).

2. The court of appeals affirmed, holding that the district court correctly answered the jury's questions (Pet. App. A6). The court of appeals reasoned that "[i]t is clear in this case that the evidence showed that [petitioner] was acting under color of official right when he accepted the payments from McBee," and hence there was no merit to petitioner's argument with respect to who initiated the discussion of payments (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 9-12) that the jury was erroneously instructed that he could be found guilty of extortion under color of official right even if his victim made the first mention of a payment, and that the decision affirming his conviction conflicts with *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc). His petition is out of time; in any event, his argument lacks merit. Review by this Court is unwarranted.

The district court charged the jury that petitioner must have "induced" the payment of money "willfully by means of 'extortion' " (Tr. 575). Petitioner agrees with this instruction (Pet. 7-8); his objection is that, in answering the jury's questions, the court did not require that he be the first to have raised the subject of payments. In fact, however, in an instruction that was unduly favorable to petitioner, the court responded to the jury's second question by requiring proof that petitioner demanded the money before it was offered to him. See page 3, *supra*. Moreover, petitioner admits (Pet. 12) that the evidence was sufficient to support a conclusion that he demanded the money under color of his office from CFW.

Conceding (Pet. 2-3, 10) that the weight of authority is against him, petitioner relies solely on the Second Circuit's recent decision in *United States* v. *O'Grady*, *supra*. That reliance is misplaced for several reasons. First, there is

absolutely nothing in *O'Grady* that requires the public official to make the initial mention of payments. The court stated only that the Hobbs Act requires "proof that the public official did something, under color of his public office, to cause the giving of benefits" (742 F.2d at 687; citation omitted). Moreover, nothing in the jury instructions here negated any element of the extortion offense as interpreted in *O'Grady*. Indeed, the precise instruction with which the *O'Grady* court found fault was the statement that " '[t]he Government need not show that the defendant in words or otherwise induced, requested, demanded, or solicited the benefits' " (*id.* at 686). Here, in contrast, the jury was instructed that inducement was necessary.

Further, there was ample evidence here of the sort of conduct that the Second Circuit considered to be within the statute. The court in *O'Grady* explained (*id.* at 688-689):

> While the government is not required to prove that the public official demanded or directly solicited the benefits received, or that he offered a specific *quid pro quo* in exchange for the benefits, * * * the government must show that the power of public office was misused in such a way as to induce the giving of benefits.

The court elaborated that inducement could be proved circumstantially by evidence of an official's offer of a quid pro quo in exchange for payment. Here such a quid pro quo plainly existed: it is uncontroverted that petitioner offered to facilitate various aspects of the sewer construction project in exchange for $45,000. The court in *O'Grady* distinguished similar cases, including one where "payment [was] made after 'assurances that there would be no obstacles' to construction of [a] hotel project," [2] on the ground that their facts "establish conduct from which inducement can readily

---

[2] *United States* v. *Jannotti*, 673 F.2d 578, 596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) and Nos. 83-1891, 83-1892 (Oct. 9, 1984).

be inferred" (742 F.2d at 689). The same is true here. For these reasons, and in light of the instruction favorable to the defense on the inducement issue (in answering Question 2, page 3, *supra*), it is clear that petitioner's conviction would be affirmed under the standards set forth in *O'Grady*. Accordingly, there is no conflict requiring review by this Court.[3]

---

[3]Petitioner proceeds from the premise that *O'Grady* is in irreconcilable conflict with the Hobbs Act decisions of other circuits, and indeed asks (Pet. 4) "only for the opportunity to stand or fall with this Court's decision to review *O'Grady*." The Solicitor General, however, did not seek this Court's review of the *O'Grady* decision, in part because of the absence of a direct conflict among the circuits. While we believe that the court in *O'Grady* erred in reversing the defendant's conviction, its discussion of the Hobbs Act does not place it in square conflict with the other circuits. Should a true conflict develop in the future in light of subsequent decisions of the Second Circuit interpreting *O'Grady*, there will be ample opportunity for the Court to review the issue. This Court has, since *O'Grady*, already denied certiorari in a Hobbs Act extortion case. *United States* v. *Jannotti, supra*. In any event, even if there were a conflict with *O'Grady*, this case, involving ample evidence of inducement and an instruction favorable to the defense on the issue, would not be an appropriate one in which to resolve it.

Petitioner raises two additional issues at the close of his petition (page 12 n.5). Even if these are considered properly presented (see Sup. Ct. R. 21.1(a)), they are without merit. The first argument is nothing more than a restatement of the position taken in the petition. The court's instructions concerning inducement adequately described the offense charged, and the government did not in the indictment undertake to prove that the first contact was made by petitioner. With respect to petitioner's argument concerning the entrapment charge, it is clear that the instructions placed the burden on the government of proving predisposition beyond a reasonable doubt (Tr. 578-579). The court's answer to the jury's last question, which reiterated this requirement (page 4, *supra*), surely did not negate it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

DECEMBER 1984

DOJ-1984-12

Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-449

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER SWIFT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

JOEL S. PERWIN, ESQ.
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorney for Petitioner

January 3, 1985

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT CONVICTION FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT UNDER THE HOBBS ACT, 18 U.S.C. §1951(b)(2), DOES NOT REQUIRE ANY PROOF THAT THE DEFENDANT PUBLIC OFFICIAL INDUCED OR SOLICITED THE PAYMENT.

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No. 84-449

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER SWIFT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

Not content with our acknowledgement that there was sufficient evidence at trial to support a conclusion that Swift obtained the money in question by demanding it in return for governmental favors (petition at 7), the United States chooses to summarize that evidence at great length

(brief at 2), as if it were unchallenged fact. But as we emphasized, that summary is irrelevant to the point at issue, which is that the trial court's instructions permitted the jury to convict Swift of extortion despite an unwillingness to believe *any* of the evidence offered by the prosecution.[1]

What the United States overlooks is the substantial evidence summarized in our petition (pp. 6-7), which permitted the jury to conclude that Swift had named an amount of money, and had taken that money, only because he was repeatedly solicited and exhorted by CFW to do so. As we noted, Swift proved that CFW was in difficulty with the federal government, and that some of its highest officials had entered into plea agreements under which they promised to cooperate fully with any governmental investigation of the utility construction industry (*see* Tr. 75, 80-83, 87, 170-72, 177). Swift testified that it was McBee who first raised the question of money—as a part of CFW's attempt to curry favor with the government in light of its troubles—and who consistently exhorted him to take it (Tr. 414-18, 430). Swift attributed to McBee the representation that McBee would be leaving CFW in the future, and that CFW would give him a better recommendation if he went along with this attempted bribery (Tr. 416). Indeed, one of the tape-recorded conversations revealed McBee's representation that Swift's acceptance of the money would "mean a difference of me getting a job somewhere else" (Tr. 510).

---

1. As the court noted in *United States v. O'Grady*, 742 F.2d 682, 692-93 (2nd Cir. 1984) (en banc): "This is not to say that O'Grady could not have been found guilty on the facts of this case if the jury had been properly charged. . . . A new trial is necessary because the charge to the jury omitted an essential element of the offense, *to wit*, a finding that O'Grady misused his office to obtain benefits not due him or his office."

As we noted (petition at 9), the jury's questions strongly suggest that it believed Swift's version of what had happened. The jury asked it it were necessary for Swift to make the first approach in order to be guilty of extortion—a question which would have been irrelevant unless it believed that McBee had first approached Swift. The jury asked if Swift would still be guilty of extortion if McBee had offered him money and Swift had simply accepted it—an unmistakable signal that it believed Swift's story. The jury asked the difference between bribery and extortion, disclosing a clear belief in Swift's testimony that he had simply taken a bribe (A. 4). And later, the jury asked if it was extortion if McBee or CFW had offered Swift some money, and Swift had simply "stated a dollar amount" and then took the money (A. 4)—another unmistakable indication that it believed Swift's testimony.

Whether or not the jury's questions disclose a belief in Swift's testimony, however, the important point is that Swift's evidence *permitted* such a belief, and that the trial court's late instruction required conviction *despite* such a belief. As we emphasized, it told the jury, in response to the fourth question, that Swift would be guilty of extortion for merely *stating* a dollar amount in response to McBee's offer of money—thus permitting his conviction despite the jury's belief that he had done so not in any affirmative misuse of his office, but only in response to repeated exhortation. We contend that *O'Grady* forbids that result, thus creating an explicit inter-circuit conflict.

ARGUMENT

The government's entire argument is an attempt to knock down a straw man, because it assumes that the basis for Swift's petition is the trial court's altered answer to the jury's second question, rather than its erroneous and prejudicial answer to the fourth question, which constitutes reversible error.[2] The second question asked whether it was necessary for Swift to make the first approach in order to be guilty of extortion; the trial court first answered "yes" and later answered "no" (A. 4-5). Isolating that instruction as the basis for Swift's petition, the government devotes the entirety of its brief to a demonstration that even under *O'Grady*, extortion may be shown by the defendant's exhortations, even if the complaining witness first raised the subject. We might quibble with that conclusion,[3] but that is unnecessary.

The basis for our petition is the trial court's response to the fourth question—completely ignored in the government's brief—to the effect that Swift would be guilty of extortion for doing nothing more than *stating* a dollar amount in response to an offer from the complaining witness—and by implication (in light of Swift's testimony), even in response to repeated entreaties that he take some money.

In its extended and irrelevant effort to discover in *O'Grady* nothing which requires that a public official initiate the discussion of payments, the government fails

---

2. Even the government's statement of the Question Presented makes this mistake.

3. As the court noted in *O'Grady*, 742 F.2d at 691: "Thus extortion under color of official right begins with the public official, not with the gratuitous actions of another."

even to attempt a demonstration that *O'Grady* would permit conviction for extortion solely on the basis of evidence that the complaining witness had offered some money and the defendant had named the dollar amount. As we argued (petition at 10-12), the *O'Grady* holding is flatly inconsistent with the trial court's instruction to that effect. As *O'Grady* holds, "the government must show that the power of public office was misused in such a way as to *induce* the giving of benefits," 742 F.2d at 689 (our emphasis). That statement alone is flatly inconsistent with the trial court's instruction that Swift would be guilty of extortion for simply naming a dollar amount in response to an offer of payment—and this requirement is the heart of the *O'Grady* decision.

O'Grady requires proof "that the public official did something, under color of his public office, to cause the giving of benefits." *Id.* at 687. It finds in the extortion statute something more than "an affirmative obligation not to accept benefits of any type or form." *Id.* It disapproves the district court's instruction because it permitted conviction "absent any proof that [the defendant] wrongfully used his office to *induce* the benefits he received"—because it "equated the mere acceptance of benefits by a public official with wrongful use of public office . . . ." *Id.* at 688. It acknowledges that the "fact of public office supplies the potential threat or force necessary," but insists that "it is the wrongful use of that office to induce benefits that constitutes the crime." *Id.* As we have noted, it holds that "extortion under color of official right begins with the public official, not with the gratuitous actions of another." *Id.* at 691. Acknowledging that "inducement can take many forms," it nonetheless requires "[p]roof of a request, demand or solicitation, no matter how subtle . . . ." *Id.* at 691. At the least, the prosecution

must show that the defendant "created the impression, not by words but by deeds," that his victims "were expected to make generous 'gifts' . . . ." *Id.* at 692. It forbids conviction for extortion "unless the jury charge makes clear that this offense requires the jury to find that the public official did something, under color of his office, to cause the giving of benefits." *Id.* at 693.

These repeated pronouncements are flatly inconsistent with the trial court's instruction that Swift would be guilty of extortion if he simply named a dollar amount in response to an offer—and by implication, given Swift's evidence, that he would be guilty for naming a dollar amount even as the product of repeated and unrelenting exhortation by McBee. Taken in the light most favorable to Swift, that evidence cannot be reconciled with *O'Grady's* holding that the defendant must be shown to have "created the impression" that his victims "were expected to make generous 'gifts' "—and that the government must show "a request, demand or solicitation, no matter how subtle." To the contrary, the late charge permitted conviction in the absence of any evidence that Swift had affirmatively induced payment in any way.

This instruction could not have been given in the Second Circuit after *O'Grady*, notwithstanding the government's decision to seek no review of *O'Grady* in this Court. The conflict between the circuits is manifest, and it should be resolved. This is the perfect case for such resolution—the first case (to our knowledge) after *O'Grady* which presents the conflict squarely. The federal courts of this nation are presently instructing juries under two unmistakably different and irreconcilable interpretations of the Hobbs Act's prohibition against extortion—thus permitting convictions in some circuits which would not be permitted

in others. It is respectfully submitted that this conflict must be resolved.[4]

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
By: JOEL S. PERWIN

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4. In our initial petition (p. 12 n.5), we also raised two additional points in support of reversal. First is that the government clearly obligated itself by its indictment to prove some form of exhortation or inducement (A. 12-13), and the trial court's belated instructions constituted either a constructive amendment to, or a fatal variance from, the indictment. The government answers that this is nothing more than a restatement of the position taken in the petition, but there is a difference. Even if this Court were to disapprove the *O'Grady* decision, and thus uphold the trial court's instructions in this case, Swift's conviction nonetheless would have to be reversed in light of the variance. Having obligated itself to prove inducement, the government was required to do so.

Second, we argued that the late instructions erroneously imposed upon Swift the burden of proving his entrapment defense, because they informed the jury without qualification that Swift would be guilty of extortion for simply stating a dollar amount in response to McBee's offer—without qualifying that statement to emphasize that Swift would remain not guilty of the offense unless and until the government proved predisposition in the face of his entrapment defense. The government responds by citing both an earlier and a later charge about the government's burden of proving predisposition, ignoring the point.